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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1531

ALBERT JOHNSON, REV. EDDIE McBRIDE, JOHN FERGUSON, CHARLES CHIPLIN, ISAAC REMBERT and JAMES ODELL DIXON,

Petitioners,

vs.

STATE OF MISSISSIPPI,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPINIONS BELOW

The opinions of the lower courts are adequately presented in the petition.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on January 14, 1974. The petition for a rehearing or in the alternative a rehearing en banc was denied on March 15, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether 18 U.S.C. §245 is a law *providing* for equal civil rights as envisioned by 28 U.S.C. §1443(1) to serve as a foundation for criminal removal.

STATEMENT OF THE CASE

On or about March 25, 1972, a black boycott of local businesses began in Vicksburg, Mississippi, and continued for approximately five weeks. The stated purpose of this campaign was to attain equal employment opportunities in the privately owned establishments and in the municipal government and its agencies.

The petitioners allege that they were "engaged in picketing and distribution of leaflets" and that these activities are constitutionally protected modes of expression. While it is not disputed that these petitioners may or may not have been engaged in these normally protected activities at one time or another, respondent states that these are not the incidents for which the individuals were charged.

Factual presentation indicates that there had been two separate instances surrounding the arrests of the complaining individuals. The first was marching and/or picketing in the City of Vicksburg. There were no accompanying incidents to necessitate state action. However, the second is of an entirely different posture. The arrests of the petitioners arose from acts of intimidation toward shoppers and/or merchants who were attempting to perform related business activities. The arrests in question occurred on these separate occasions—May 2, May 13 and May 15, 1972. Nearly all arrests were founded upon a breach

of the Mississippi Secondary Boycott statute, §97-23-85, Mississippi Code of 1972. However, on May 13, 1972, Albert Johnson was additionally charged upon sworn affidavit pursuant to §97-23-83, Mississippi Code of 1972, of having specifically interfered with and intimidated one James E. Sturgis, a black principal of a high school, for trading with a white merchant.

In an attempt to utilize the removal statute, 28 U.S.C. §1443(1), the petitioners assert the Civil Rights Act of 1968, 18 U.S.C. §245.

Predicated upon the pronouncements of this Court in *Georgia v. Rachel,* 384 U.S. 780 (1966) and *Greenwood v. Peacock,* 384 U.S. 808 (1966), the courts below denied the petitioners' request for removal. The district court issued its order of remand January 4, 1973; the Circuit Court of Appeals affirmed, 5 Cir., 1974, 488 F.2d 284, reh. and reh. en banc denied 491 F.2d 94. In doing so, the appellate court rejected the petitioners' argument that 18 U.S.C. §245 is sufficient basis to invoke the federal removal statute.

ARGUMENT

In its original panel decision, the Circuit Court of Appeals succinctly stated the issue now before this Court:

> "The key to removal under §1443(1) is whether there exists a law 'providing for . . . the equal civil rights of citizens.' Unlike all previous cases which have interpreted the phrase and which have focused on whether a particular statute meets the 'equal civil rights' test, the essential inquiry here is whether §245, which clearly deals with equal civil rights, meets the requirement that the law be one providing such rights." 488 F.2d 284, 286.

I.

The Teachings of Rachel and Peacock Foreclose Petitioners from Utilizing the Extraordinary Remedy of Removal in This Cause.

After a comprehensive analysis of the history of the civil rights removal statute and the opinions construing it, this Court concluded in *Georgia* v. *Rachel,* supra, that decisions up to that time had established that, in order to come within what is now Section 1443(1), a petitioner must show that a denial or inability to enforce "a right under any law providing for the equal civil rights of citizens of the United States" in the courts of a state "be manifest in a formal expression of state law," 384 U.S. 780, 803-804. Quoting the statement in *Virginia* v. *Rives,* 100 U.S. 313, 319 (1880), that the denial of which the removal statute speaks "is primarily, if not exclusively, a denial . . . resulting from the Constitution or laws of the State . . .," the Court held that removal under Section 1443(1) would be justified "if an equivalent basis could be shown for an equally firm prediction that the defendant would be 'denied or cannot enforce' the specified federal rights in the state court."

When speaking to the question of removal, of paramount issue there as here the Court, in its interpretation of the federal statute, stated as its directive:

> "Section 1443(1) entitles the defendants to remove these prosecutions to the federal court only if they meet both requirements of that subsection. They must show both that the right upon which they rely is a 'right under any law providing for . . . equal civil rights,' and that they are 'denied or cannot enforce' that right in the courts of Georgia." *Rachel,* 384 U.S. 780, 788.

These limitations were met in *Rachel* by the Court's recognition of two intervening factors: (1) the passage of Congress of the Civil Rights Act of 1964, Section 201, 78 Stat. 243, 42 U.S.C. 2000(a); and (2) their interpretation of that statute in *Hamm* v. *City of Rock Hill,* 379 U.S. 306 (1964). While acknowledging that Public Accommodations legislation was enacted subsequent to the attempted removal, the Court reasoned that the Act entitled all persons to be served in restaurants open to the public. The defendants who had been in such a restaurant were being prosecuted under a Georgia statute making it a misdemeanor to not leave the premises when ordered to do so by the "owner or person in charge." Section 203(c) of the Civil Rights Act prohibits any "attempt to punish" persons for exercising the rights of equality so conferred. This had been interpreted in *Hamm* to prohibit not merely conviction but prosecution. Hence, if defendants could substantiate the allegations in the removal petition that they had been asked to leave for racial reasons, prosecution in the state courts would itself "deny" a right conferred by Title II of the 1964 Civil Rights Act.

Illustrating that removal is essentially factual, the Court reached a different conclusion in *City of Greenwood* v. *Peacock,* 384 U.S. 808 (1966). There the defendants were charged with obstructing public streets, and various other offenses. The then petitioners alleged their arrests were racially motivated, stemming from their participation in voter registration drives in Mississippi. Despite the enactment of the Voting Rights Act of 1965, 42 U.S.C. 1973, the Court held that this case was to be governed by the previous line of decisions against removal culminating in *Kentucky* v. *Powers,* 201 U.S. 1 (1906), rather than *Rachel.*

A clear distinction was made between *Rachel* and *Peacock*. In the language of the decision:

> "The present case differs from Rachel in two significant respects. First, no federal law confers an absolute right on private citizens—on civil rights advocates, on Negroes, or on anybody else—to obstruct a public street, to contribute to the delinquency of a minor, to drive an automobile without a license or to bite a policeman. Second, no federal law confers immunity from state prosecutions on such charges." *Peacock*, 384 U.S. 808, 826, 827.

In sum, the doctrine announced by the Court was also a limitation on removal.

> "It is *not* enough to support removal under Section 1443(1) to allege or show that the defendant's federal equal civil rights have been illegally and corruptly denied by state administrative officials in advance of trial, that the charges against the defendant are false, or that the defendant is unable to obtain a fair trial in a particular state court. The motives of the officers bringing the charges may be corrupt, but that does not show that the state trial court will find the defendant guilty if he is innocent, or that in any other manner the defendant will be 'denied or cannot enforce in the courts' of the State any right under a federal law providing for equal civil rights. The civil rights removal statute does not require and does not permit the judges of the federal courts to put their brethren of the state judiciary on trial. Under Section 1443(1), the vindication of the defendant's federal rights is left to the state courts except in the rare situations where it can be clearly predicted by reason of the operation of a pervasive and explicit

state or federal law that those rights will inevitably be denied by the very act of bringing the defendant to trial in the state court. Georgia v. Rachel, 384 U.S. 780, 16 L.Ed.2d 925, 86 S.Ct. 1783; Strauder v. West Virginia, 100 U.S. 303, 25 L.Ed. 664." (Emphasis in original) *Peacock*, 384 U.S. 808, 827, 828.

II.

18 U.S.C. §245 Is a Criminal Statute That Does Not Provide for Equal Civil Rights.

The argument of Albert Johnson, et al., for removal is founded on the Civil Rights Act of 1968, 82 Stat. 73, which was added to Title 18 of the United States Code §245, entitled "Federally Protected Activities." Unlike the statutes on public accommodations and voting rights, the 1968 Act does not in terms confer substantive rights; it is solely a criminal statute permitting federal prosecution for interference with a long list of activities. *Perkins* v. *Mississippi*, 5 Cir. 1972, 470 F.2d 1371 (en banc affirmance, concurring opinion, Bell, J.); *Williams* v. *Tri-County Community Center*, 5 Cir. 1971, 452 F.2d 221, fn. 3; *Hill* v. *Commonwealth of Pennsylvania*, 3 Cir. 1971, 439 F.2d 1016, cert. den. 404 U.S. 985; *People of State of New York* v. *Horelick*, 2 Cir. 1970, 424 F.2d 697, cert. den. 398 U.S. 939.

Subdivision (b) says that "Whoever, whether or not acting under color of law, by force or threat of force willfully injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with" five broad categories of persons, several divided into subcategories, shall be subject to fine or imprisonment as there described. At least two of the categories, (1) and (3), taken by themselves, would not seem to fit the definition of "equal civil

rights" in *Rachel,* to-wit, "any law providing for specific civil rights states in terms of racial equality." 384 U.S. 780, 792.

III.

The Facts of Johnson Dispel Any Reliance upon 18 U.S.C. §245(b) and Place This Cause Squarely Within the Strictures of Rachel and Peacock.

The petitioners in this appeal were not arrested as a result of their exercise of any First Amendment right of expression, i.e., picketing and marching. The legal proceedings in question were initiated only *after* it was discovered that certain individuals were in fact engaged in ancillary, unprotected activity to perpetuate an illegal boycott. In other words, the respondent believes that the reason for probable cause and the subsequent arrests of these individuals was unprotected conduct outside the ambit of the First Amendment shield. *United States* v. *O'Brien,* 391 U.S. 367, 376 (1968). The right of peaceful protest does not mean that everyone with opinions or beliefs may express them in any manner, at any time and at any place. *Cox* v. *Louisiana,* 379 U.S. 559 (1965). In effect, such a posture places the actions of the petitioners squarely within the admonition of the Supreme Court in *Peacock,* 384 U.S. 808, 826, 827:

> "The present case differs from Rachel in two significant respects. First, no federal law confers an absolute right on private citizens—on civil rights advocates, on Negroes, or on anybody else—to obstruct a public street, to contribute to the delinquency of a minor, to drive an automobile without a license, or to bite a policeman. Second, no federal law confers immunity from state prosecutions on such charges."

Therefore, when stripped of all else, the petitioners are left with nothing more than First Amendment allegations to support their request for removal. This is insufficient; injunction is more appropriate, *Peacock*, 384 U.S. 808, 825, 829, and the timetable more immediate, *Mitchum* v. *Foster*, 407 U.S. 225 (1972).

CONCLUSION

Upon the facts presented in this case, it may clearly be seen that the exacting criteria for removal has not been met. 18 U.S.C. §245 is, by its very language, criminal in nature; it "provides" no specific civil right stated in terms of racial equality. Removal is not the proper remedy here; a more appropriate avenue would have been to seek injunctive relief.

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE

I, Ed Davis Noble, Jr., Special Assistant Attorney General, do hereby certify that I have mailed this date by United States Mail, postage prepaid, a true and correct copy of the above and foregoing Brief of Respondent in Opposition to Petition for Writ of Certiorari to:

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THIS the 12th day of June, 1974.

ED DAVIS NOBLE, JR.